Gold Coin Specialities Sdn Bhd v Maheswaran a/l Paspanathan

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2-25-129 OF 2002
WAN AFRAH JC
27 JANUARY 2004

Evidence — Adverse inference — Failure to produce document — Employee alleged to have taken advances from petty cash without authorization — Constructive dismissal — Application by employee for reinstatement — Industrial Court invoked s 114(g) of Evidence Act 1950 against employer for failure to adduce company's policies on cash advances — Whether Industrial Court rightly invoked s 114(g)

Labour Law — Industrial Court — Award — Application to quash — Whether Industrial Court committed errors of law — Constructive dismissal — Whether Industrial Court applied correct

Labour Law — Industrial Court — Award — Reinstatement — Whether Industrial Court considered compatibility of reinstatement order

This was an application by the applicant for an order to quash the Industrial Court's award. The Industrial Court found the respondent constructively dismissed by the applicant and made the orders that the respondent be reinstated to his former position as the applicant's Operation Manager and that the respondent be paid backwages, annual increments, housing allowances and bonuses. The applicant had alleged that the respondent had been taking advances from the petty cash, without approval and had instructed the applicant's mill controller, following a burglary, to make an insurance claim based on the full book value of the petty cash records, including the sum taken by the respondent. The respondent attended a meeting on 7 January 1999, in which he was questioned over the allegations. The respondent denied the allegations. The applicant then issued a show cause letter to the respondent and placed the respondent on suspension, with full pay. The respondent wrote to the applicant stating that he considered himself to have been constructively dismissed on 7 January 1999. The respondent lodged a complaint under s 20 of the Industrial Relations Act 1967 ('the Act') at the Industrial Relations Department. The matter was subsequently referred to the Industrial Court for adjudication. The applicant challenged the award of the Industrial Court for errors of law on the grounds that: (a) the Industrial Court failed to confine itself to the reasons provided by the respondent in his letter of constructive dismissal; (b) the Industrial Court failed to apply the correct test of constructive dismissal; (c) the Industrial Court failed to consider relevant and material facts when it came to the conclusion that there was no evidence on the misconduct; (d) that the Industrial Court was wrong to invoke s 114(g) of the Evidence Act 1950 ('the Evidence Act') against the applicant; (e) the Industrial Court failed to consider whether the dismissal of the respondent was with just cause or excuse; (f) the Industrial Court acted in breach of s 30(3) of the Act and (g) the Industrial Court failed to consider that the order of reinstatement was incompatible to the factual circumstances of the case.

Held, dismissing the application:

(1) In respect of ground (a), it was apparent from the award that the Industrial Court's Chairman had disregarded the issues which were not pleaded by the respondent in his pleadings and constrained itself to those that were specifically pleaded (see para 26).

(2) In respect of ground (b), the Chairman of the Industrial Court had applied the 'contract test' and not the 'unreasonableness test'. This could be clearly seen in the award. On this account, the learned Chairman had cited and interpreted case law correctly. The learned Chairman had critically analysed and evaluated the evidence adduced by both parties to the suit, before deciding that there had been a fundamental breach of contract by the applicant upon which the respondent left (see paras 32 and 33).

(3) In respect of ground (c), the Chairman of Industrial Court had scrutinised the findings of facts based on the evidence placed before him. The court was inclined not to disturb the findings of facts made by the Industrial Court as the Industrial Court had looked into the facts in totality (see paras 37 and 38).

(4) In respect of ground (d), the Industrial Court had invoked s 114 (g) of the Evidence Act against the applicant because the applicant did not adduce any corporate book which might have provided the policies on cash advances. The Industrial Court was merely ascertaining whether the routine practiced by the respondent in taking advances from the petty cash for travelling was irregular and contravened the procedure practiced by the applicant. Hence, the presentation of such corporate book was necessary. The applicant failed to produce the corporate book and the Industrial Court had rightly invoked s 114 (g) of the Evidence Act (see paras 40 and 42).

(5) In respect of ground (e), the applicant submitted that from the evidence adduced by the applicant on the respondent's misconduct, there was sufficient evidence for the Industrial Court to come to the conclusion that the constructive dismissal of the respondent was with just cause or excuse. Having considered the arguments and case law submitted by both counsel, together with the Industrial Court's decision thereon, there was no evidence that the respondent was guilty of any serious misconduct and the dismissal of the respondent by the applicant was without just cause or excuse (see paras 44 and 45).

(6) In respect of ground (f), although the Industrial Court had failed to hand down its award within 30 days as provided by s 30(3) of the Act, this delay did not in anyway cause the judge to lose the facts of the case before him (see para 47).

(7) In respect of ground (g), the Industrial Court should have considered granting compensation in lieu of reinstatement to the respondent to maintain industrial harmony in the applicant's establishment. This was because: (i) the respondent was penalized by the Industrial Court for his contributory misconduct by retaining the applicant's property; (ii) the

post of general manager held by the respondent then had currently been filled by another as the applicant cannot withhold the position vacant for long period; (iii) s 20 of the Act allowed the Industrial Court the discretion to award compensation in lieu of reinstatement in certain circumstances; (iv) COW-3, who gave evidence against the respondent at the Industrial Court was still under the employ of the applicant. Should the respondent be reinstated, it could cause disharmony in the work place between the respondent and COW-3; (v) the respondent was relatively young and able and would be able to secure a good employment elsewhere. Accordingly, the order of reinstatement was quashed and the matter to be remitted to the Industrial Court for remedies (see paras 51, 52 and 53).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon untuk satu perintah untuk membatalkan award Mahkamah Perusahaan. Mahkamah Perushaan telah memutuskan bahawa responden telah dipecat dengan konstruktif oleh pemohon dan telah membuat perintah bahawa responden dikembalikan jawatannya kepada jawatan terdahulu sebagai Pengurus Operasi pemohon dan bahawa responden dibayar gaji yang tertunggak, kenaikan gaji tahunan, elaun perumahan dan bonus. Pemohon telah mengatakan bahawa responden telah mengambil pendahuluan pinjaman daripada tunai runcit tanpa kebenaran dan telah mengarahkan pengawal kilang pemohon, setelah kecurian berlaku, supaya menuntut insurans berdasarkan seluruh nilai buku rekod tunai runcit, termasuk jumlah yang diambil oleh responden. Responden telah menghadiri satu mesyuarat pada 7 Januari 1999 di mana beliau telah dipersoalkan tentang kejadian yang dikatakan itu. Responden telah menafikan pertuduhan itu, Pemohon telah mengeluarkan surat tunjuk sebab kepada responden dan telah menggantungkan responden, dengan gaji penuh. Responden telah menulis surat kepada pemohon mengatakan bahawa beliau telah menganggap dirinya etlah dipecat secara konstruktif pada 7 Januari 1999. Responden telah memfailkan satu aduan di bawah s 20 Akta Perhubungan Perusahaan 1967('Akta itu') dengan Bahagian Perhubungan Perusahaan. Perkara itu kemudiannya dirujuk kepada Mahkamah Perusahaan untuk dibicarakan. Pemohon telah mencabar award Mahkamah Perusahaan untuk kekhilafan undang-undang pada alasan-alasan: (a) Mahkamah Perusahaan gagal menghadkan dirinya kepada alasan-alasan yang diberi oleh responden di dalam surat pemecatan konstruktifnya; (b) Mahkamah Perusahaan gagal memakai ujian pemecatan konstruktif yang betul; (c) Mahkamah Perusahaan gagal mempertimbangkan fakta-fakta yang relevan dalam memutuskan bahawa tiada keterangan untuk salah laku; (d) Mahkamah Perusahaan telah terkhilaf dengan menggunakan s 114(g) Akta Keterangan 1950 ('Akta Keterangan') terhadap pemohon; (e) Mahkamah Perusahaan gagal mempertimbangkan sama ada pemecatan responden adalah tanpa kuasa yg adil dan munasabah; (f) Mahkamah Perusahaan telah melanggar s30(3) Akta itu dan (g) Mahkamah Perusahaan telah gagal mempertimbangkan perintah pengembalian jawatan adalah tidak sesuai dengan keadaan fakta di dalam kes ini.

Diputuskan, menolak permohonan itu:

(1) Berkaitan alasan (a), ia jelas daripada award bahawa Pengerusi Mahkamah Perusahaan telah tidak menghiraukan isu-isu yang tidak diplidkan oleh responden di dalam plidingnya dan menghadkan dirinya kepada perkara yang diplid dengan khusus (lihat perenggan 26).

(2) Berkaitan alasan (b), Pengerusi Mahkamah Perusahaan telah memakai 'contract test' dan bukan 'unreasonable test'. Ini jelas daripada award itu. Oleh itu, Pengerusi yang arif telah menyebut dan mentafsirkan undang-undang kes dengan betul. Pengerusi yang arif telah menganalisakan dengan kritis dan menilai keterangan ynag dikemukakan oleh kedua-dua parti kepada guaman ini, sebelum memutuskan bahawa terdapat pelanggaran kontrak yang penting oleh pemohon diatas mana responden dipecat (lihat perenggan 32 dan 33).

(3) Berkaitan alasan (c), Pengerusi Mahkamah Perusahaan telah meneliti keputusan fakta berdasarkan keterangan di hadapannya. Mahkamah bercenderung tidak mengacau keputusan fakta yang dibuat oleh Mahkamah Perusahaan memandangkan Mahkamah Perusahaan telah meneliti fakta-fakta sepenuhnya (lihat perenggan 37 dan 38).

(4) Berkaitan alasan (d), Mahkamah Perusahaan telah menggunakan s 114(g) Akta Keterangan terhadap pemohon sebab pemohon tidak mengemukakan buku korporat yang mungkin memberi polisi-polisi pendahuluan pinjaman wang. Mahkamah Perusahaan hanya memastikan sama ada rutin yang dijalankan oleh responden di dalam mengambil pendahuluan pinjaman daripada tunai runcit untuk perjalanan adalah luar aturan atau dan bercanggah dengan amalan pemohon. Pemohon gagal mengemukakan buku korporat dan Mahkamah Perusahaan telah menggunakan s 114(g) dengan betul (lihat perenggan 40 dan 42).

(5) Berkaitan alasan (e), pemohon telah menghujahkan bahawa daripada keterangan yang dikemukakan oleh pemohon mengenai salah laku responden, terdapat keterangan yang mencukupi untuk Mahkamah Perusahaan memutuskan bahawa pemecatan konstruktif adalah dengan sebab dan alasan yang adil. Setelah mempertimbangkan penghujahan dan undang-undang kes yang dikemukakan oleh kedua-dua peguam, bersama keputusan Mahkamah Perusahaan, tiada keterangan bahawa responden bersalah pada salah laku yang serius dan pemecatan responden oleh pemohon adalah tanpa sebab dan alasan yang adil (lihat perenggan 44 dan 45).

(6) Berkaitan alasan (f), walaupun Mahkamah Perusahaan telah gagal memberikan award di dalam masa 30 hari seperti yang diperuntukkan di dalam s 30(3) Akta itu, kelewatan itu tidak menyebabkan hakim untuk menghilangkan fakta-fakta kes di hadapan beliau (lihat perenggan 47).

(7) Berkaitan alasan (g), Mahkamah Perusahaan patut telah mempertimbangkan memberikan pampasan sebagai ganti pengembalian jawatan kepada responden untuk mengekalkan harmoni perusahaan di dalam syarikat pemohon. Ini adalah sebab: (i) responden telah didenda oleh Mahkamah Perusahaan untuk salah laku tambahan beliau dengan menyimpan harta pemohon; (ii) jawatan pengurus besar yang dipegang oleh responden

telahpun diambil oleh orang lain kerana pemohon tidak dapat membiarkan jawatan itu dikosongkan untuk tempoh masa lama; (iii) s 20 Akta itu memberikan Mahkamah Perusahaan budibicara untuk mengawardkan pampasan sebagai ganti pengembalian jawatan di dalam keadaan tertentu; (iv) COW-3, yang memberi keterangan terhadap responden di Mahkamah Perusahaan masih bekerja untuk pemohon. Jika responden dikembalikan jawatannya, ia mungkin menyebabkan ketidakharmonian di tempat bekerja di antara responden dan COW-3; (v) responden masih muda dan berkebolehan dan dapat mencari pekerjaan di tempat lain. Oleh itu perintah pengembalian jawatan dibatalkan dan perkara ini diremitkan ke Mahkamah Perusahaan untuk remedi (lihat perenggan 51, 52 dan 53).]

Notes

For cases on failure to produce document, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 181.
For cases on awards from the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241-1288.
For presumption of adverse inference, see 12 *Halsbury's Laws of Malaysia*, para [210.035].

Cases referred to

Bayer (M) Sdn Bhd v Anwar Abd Rahim [1996] 2 CLJ 49 (refd)
Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361 (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, (refd)
Minolta Malaysia Sdn Bhd v Ng Siew Pheng & Anor [1996] 3 AMR 3421 (refd)
MUI Bank Bhd Johor v Tee Puat Kuay [1993] 3 MLJ 239 (refd)
Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan [2000] 2 MLJ 272 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Southern Bank Bhd v Ng Keng Lian & Anor [2002] 5 MLJ 553, 1747 (refd)
VP Nathan & Partners v Illangovan s/o Dorairaj A Suppiah and another motion [2002] 1 MLJ 341 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Industrial Relations Act 1967 ss 20, 30(3), (5),

Vijayan Venugopal (Raymond TC Low with him) (Shearn Delamore & Co) for the applicant.
S Muhendaran (Muhendaran Sri) for the respondent.

Wan Afrah JC:

INTRODUCTION

[1] This is an application by Gold Coin Specialities Sdn Bhd ('the applicant') for an order to quash the Industrial Court's Award No. 824 of 2002.

In the said Award, the Industrial Court found Mr Maheswaran a/l Paspanathan ('the respondent') was constructively dismissed by the applicant. Accordingly, the Industrial Court made the following orders:

(i) that the respondent be reinstated to his former position as Operation Manager to the company within one month of the date of the Award;

(ii) that the respondent be paid backwages from 1 February 1999, annual increments, housing allowances, bonuses inclusive of performance bonuses without loss of seniority;

(iii) that the backwages be calculated in such manner: RM13,500 (includes 12 months salary and 1.5 months mandatory bonus) x 25 months and7 days (from 1 February 1999 to the last date of hearingie 8 March 2001) —

	RM 340,650.00
less 20% for misconduct	272,520.00
less the telephone bills	1,669.25
Total backwages due to respondent	RM 270,850.00

The above sum is to be paid to the respondent's solicitors within (1) one month from the date of this Award.

[2] The basis of the decision of the Industrial Court is contained at p 27 of the Award, which states the following:

> … having perused through the evidence of all the witnesses including the claimant and the documents/exhibits, this court comes to the conclusion that the company was in breach of contract when COW-4 told the claimant to resign from job, citing petty cash allowances and the burglary incident. The claimant left the company on the same date ie on 7 January 1999. Therefore, the court holds that the dismissal of the claimant by the company is without just cause and excuse.

FACTS

[3] The respondent was appointed by the applicant as an Operation Manager on 1 January 1998 and was later confirmed in the said post beginning 1 July 1998.

[4] Briefly, the facts of the case are as follows.

[5] It came to the attention of the applicant that the respondent had been in the practice of taking advances from the petty cash, without approval since April 1998 and had instructed his staff not to record such transactions.

[6] It also came to the applicant's attention that following a burglary which took place on 30 June 1998, the respondent had instructed the applicant's Mill Controller to make an insurance claim based on the full book value of the petty cash records, including a sum of RM600 which had actually been taken by the respondent earlier. The respondent was also found to have further utilized his influence to remove the evidence (in the form of an acknowledgement memo) of his having taken the said sum from the petty cash and indicated he would donate the amount to the Sports Club.

[7] The aforesaid irregularities were only brought to the attention of the management on 6 January 1999 by certain employees of the applicant and after questioning the individuals concerned, the respondent was requested by one Soh Ching Kher a Group Director whom the respondent reported to, to attend a meeting on 7 January 1999.

[8] At the meeting which was attended by the respondent, Mr Soh Ching Kher and Mr Poh Yong Thong (Group Technical Manager), the respondent was questioned over the unauthorized utilization of petty cash as alleged by the employees of the applicant. The respondent denied to taking advances from the petty cash without approval nor did he admit that he instructed the applicant's Mill Controller to make any fraudulent insurance claims.

[9] On 11 January 1999 the applicant issued a show cause letter to the respondent. Pending the respondent's reply and decision by the Company, he was placed on suspension with full pay.

[10] The respondent in his letter dated 13 January 1999 replied and pointed that he considered himself to have been constructively dismissed on 7 January 1999.

[11] The applicant responded to the respondent by a letter dated 15January 1999 and denied his contention that he had been dismissed. The respondent was informed that his contention in this regard was misconceived and was viewed as an attempt to avoid the consequences of his actions. The respondent was further reminded that he was still an employee of the Company and was therefore requested to furnish a written explanation.

[12] Subsequently when the respondent failed to provide any explanation as required, the applicant then decided to convene a domestic inquiry to hear the charges proffered against the respondent. The respondent was informed of the same by a letter dated 26 January 1999.

[13] By a letter dated 29 January 1999, the respondent responded to the applicant where he indicated that he would not attend any inquiry and he considered himself dismissed with effect from 7 January 1999.

[14] The applicant responded to the respondent under cover of letter dated 5 February 1999 and reiterated that he had not been dismissed on 7January 1999. The applicant further put the respondent a notice that in light of his actions and refusal to attend the domestic inquiry, it had no alternative but to deem that he had resigned from service with effect from 7January 1999 in an attempt to avoid the consequences of his earlier actions.

[15] The respondent continued to retain the Company's handphone, keys, other documentation until 10 May 1999 despite numerous requests from the respondent to return the same.

[16] Subsequent to his departure from the services of the applicant, the respondent lodged a complaint under s 20 of the Industrial Relations Act 1967 at the Industrial Relations Department. The matter was subsequently referred to the Industrial Court for adjudication.

[17] The aforesaid reference was registered as Industrial Court case No. 5/4-432/99. The matter was heard by the Industrial Court in Johor Bahru.

[18] The Industrial Court handed down its decision on the instant matter in Award 824 of 2002 dated 30 September 2002. Wherein, the learned Chairman of the Industrial Court after stating the law on constructive dismissal and after looking at the whole chain of events that led to the respondent considering himself dismissed, found that the respondent was right in considering himself dismissed and had been dismissed without just cause or excuse.

APPLICANT'S GROUNDS TO SET ASIDE THE AWARD

[19] Briefly the applicant challenges the Award for errors of law on the following grounds:

(i) that the Industrial Court failed to confine itself to the reasons provided by the claimant/respondent in his letter of constructive dismissal;

(ii) that the Industrial Court failed to apply the correct test of constructive dismissal;

(iii) that the Industrial Court failed to consider relevant and material facts when it came to the conclusion that there was no evidence on the misconduct;

(iv) that the Industrial Court was wrong by invoking s 114(g) of the Evidence Act 1950 against the applicant;

(v) that the Industrial Court failed to consider whether the dismissal of the respondent was with just cause or excuse;

(vi) that the Industrial Court acted in breach of s 30(3) of the Industrial Relations Act 1967;

(vii) that the Industrial Court failed to consider that the order of reinstatement was incompatible to the factual circumstances of the case.

FINDINGS OF THIS COURT

(i) Failure to confine to the reasons provided by the respondent in his letter of constructive dismissal.

[20] The applicant submitted that the Industrial Court had failed to appreciate that the grounds in which the respondent relied upon to support his claim for constructive dismissal were not stated and/or pleaded in his letter as in exh SCK-4 and statement of case in exh SCK-9.

[21] Counsel for the applicant pointed that the law is clear that an employee who treats himself as constructively dismissed must state the reasons which he seeks to rely upon in his letter of constructive dismissal and notify his employer of his decision the same. This is in accordance to the decision of the High Court in *Southern Bank Bhd v Ng Keng Lian & Anor* [2002] 5 MLJ 553, [2002] 2 AMR 1747. The learned counsel went on to cite other case law,

Bayer (M) Sdn Bhd v Anwar Abd Rahim [1996] 2 CLJ 49 reiterating on the aforesaid principle.

[22] In the present case, it was submitted by the counsel for the applicant that the respondent relied on the following reasons to support his claim of constructive dismissal in the course of this examination in chief:

a that COW-4 had asked him to hand over the Company documents and files;

b COW-4 did not allow the claimant to speak to his department heads;

c the claimant was not allowed to complete the sales meeting; and

d that COW-4 made it very clear that if the claimant did not leave he would be escorted out of the Company's premises.

[23] He further pointed that in the course of cross-examination, the respondent had admitted that all the above reasons were neither pleaded in his statement of case nor reflected in any of his correspondence to the applicant. In view of such admission by the respondent, the Industrial Court was not required in law to examine the reasons which the respondent relied upon to support his claim.

[24] Pertaining to the issue, counsel for the respondent however pointed that the Chairman of Industrial Court did not consider the first three reasons (as mentioned earlier) because they were not pleaded by the respondent. This was made clear by para 22 of the said award:

> It is pertinent to note that though the claimant had not pleaded the three reasons in his statement of case, he had pleaded the incident that led him to go on constructive dismissal. He had also pleaded that the Company was therefore in breach of contract of employment which went to the root of the contract. The main issue that led this incident to take place was the 'petty cash'. Though this court would disregard the three issues raised by the Company it would nevertheless proceed to hear the complaints made by the claimant in his statement of case.

[25] The learned counsel further refers to para 21 of the said Award which states the following:

> However in the statement of case the claimant at para 14 had pleaded that COW-4 did threaten the claimant that if he refused to vacate his office, he would make the claimant escorted out by the security guards. Though the letter by the claimant does not state that 'he would be escorted out', the letter does state that COW-4 asked him to resign. The letter also stated that COW-4 had written a memo to the guard house barring him from entering the company premises which COW-4 did not deny in his testimony. The claimant also in his letter denied dishonesty. Dishonesty of course refers to petty cash advances as stated in the Company's letter.

[26] It is apparent from both the paragraphs cited from the said Award, wherein the Industrial Court disregarded the issues which were not pleaded by the respondent in his pleadings and constrained itself to those that were specifically pleaded.

[27] With reference to the sentence 'Applicant barred the respondent from entering the office premises' and 'Applicant threatened to throw the respondent

out of his office' is merely semantic difference. In whichever manner said, the applicant had breached the fundamental terms of the contract of employment they had with the respondent. The underlining fact remains that the applicant does not want the respondent to continue his service of employment with the Company.

[28] In retrospect, I am satisfied with the Chairman of the Industrial Court in his action that is having taken the issues of the case objectively. There was no element of the court being swayed by other reasons. It was obvious that the court did not err in law in its finding that the applicant's act of asking the respondent to resign amounts to constructive dismissal.

[29] Most appropriately I am drawn to the authorities of the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 which states as follows, at p 178:

> The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties arguments and finally pronounce its judgment having strict regard to the issues ... . The object of pleadings is to determine what are the issues and to narrow the area of conflict ... . The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

(ii) Failure to apply the correct test on constructive dismissal

[30] It was submitted by the learned counsel for the applicant that the learned Chairman of the Industrial Court had misdirected himself on the applicable law on constructive dismissal. According to the learned counsel, the learned Chairman had applied the unreasonable test instead of employing the contract test. Thus, it was submitted that the reasonableness or unreasonableness of the applicant's conduct should not be taken into account when deciding whether there is constructive dismissal.

[31] In this present case, counsel for the applicant further submitted that the Industrial Court's basis for concluding that respondent was forced out, is in reality, a clear indication that the court was examining and questioning the reasonableness of the actions of the applicant. According to him, in order to uphold the conduct of the applicant to amount to a repudiation of the contract of employment to dismissal, there must be a breach of some relevant terms of the contract, express or implied and the breach must be so fundamental as to evince that an intention not to be bound by the contract. Thus, it was submitted that the learned Chairman had failed to identify which of the contract — express or implied, had been breached by the applicant.

[32] To my mind, the learned Chairman had applied the contract test. This can be clearly seen in the body of the Award where the learned Chairman said:

> 46 Based on *Wong Chee Hong*'s case to determine if there is constructive dismissal, it is incumbent upon the claimant to establish the following conditions:
>
> (i) Did the Company commit a breach which goes to the root of the contract of employment,
>
> (ii) Did the claimant leave soon after the breach.

This the claimant had established on a balance of probability. The claimant was forced out of the Company on the same day the breach occurred.

47 The Court of Appeal in *Quah See Khoon* has further explained as to how one could prove that the conduct complained of as amounting to constructive dismissal:

'Whether one would describe the conduct complained of as amounting to Constructive Dismissal or the breach of implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it. At the end of the day, the question simply is whether the claimant is driven out of employment or left it voluntarily.'

48 Therefore the present approach is simply whether the workman was driven out of employment or has left his employment voluntarily. This is a short way of applying the repudiation test (contract test) formulated in *Wong Chee Hong*'s case.

[33] Clearly, from the above notes, the learned Chairman was not applying the unreasonable test. He applied the correct test, that is the contract test. On this account, the learned Chairman had cited and interpreted the case law correctly. More so, I also found that the learned Chairman had critically analysed and evaluated the evidence adduced by both parties to the suit, before deciding that there had been a fundamental breach of contract by the applicant upon which the respondent left. This was evident in the Award para 49.

[34] I am also satisfied that in para 42 of the said Award, it does not in anyway indicate that the Industrial Court had resorted to the reasonableness test or questioned the reasonableness of the applicant's conduct. The Industrial Court in the Award, merely commented on the applicant's conduct and went on to hold that the applicant's action to force the respondent to resign and to throw him out of employment was a breach of contract.

[35] As a whole, pertaining to this ground, I remain and stand to disagree with the applicant's claim that the Industrial Court had erred in law and failed to apply the correct test of constructive dismissal. The Industrial Court had applied both *Wong Chee Hong* and *Quah Swee Khoon* case law correctly.

(iii) Failure to consider relevant and material facts where at the conclusion there was no evidence on the misconduct on the respondent

[36] It was submitted that the Industrial Court acted irrationally and perversely in coming to the conclusion that there was nothing to prove that the respondent had taken RM600 from the petty cash as alleged by the applicant. And that throughout the Award the Industrial Court only directed its mind to the evidence of COW-2, COW-3, COW-4 and the respondent. There is nothing whatsoever which shows the Industrial Court had considered the evidence of COW-1, who gave unrebutted evidence to prove that the respondent had taken the money from petty cash whereby he was present as witness during the enquiry meeting on 7 January 1999 where the respondent admitted to such wrongdoings.

[37] Pertaining to this ground of application, I noted that the Chairman of Industrial Court had scrutinised the findings of facts based on evidence placed before him. The Chairman in his award had concluded as such:

40 There is not even an iota of evidence to point to the claimant that he had taken RM600 as advance from the petty cash before the burglary. Therefore COW-4's evidence that the claimant did take the RM600 as advance for travelling does not hold water. If the Company is of the view that taking advance from petty cash is irregular, it should have produced the corporate book which would explain the procedure as to how advances can be taken for travelling. This, the Company failed to produce. Therefore this court is left with no alternative but to invoke s 114(g) of the Evidence Act 1950. COW-4 confronted the claimant on petty cash. He did not do a proper investigation on the issue before he accused the claimant. However evidence from the claimant, COW-2 and COW-3 would show that taking petty cash advances for travelling purposes is a routine matter in the Company. It is true that the claimant did not get approval from COW-4 before he took advances. However COW-3 said that she could always get approval from Stanley Teo if the claimant fails to get approval from COW-4. COW-4 was working in Singapore. COW-3 had informed Stanley Teo of the Claimant's taking cash advances from petty cash and he had said 'ok'. This process had been going in the Company. The claimant had taken advances for travelling before the burglary incident and the Company had taken no steps to warn him.

[38] At this juncture, I am inclined not to disturb the findings of facts made by the earlier court for I believed that the court then had looked into the facts in totality. Unless and until I find that there was an unreasonable decision so devoid of justification, I will conform to the Court of Appeal ruling in *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361 and in *Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan* [2000] 2 MLJ 272.

[39] In retrospect a point to note is that whilst the Chairman of Industrial Court made no reference to COW-1's testimony, I do not see that the witness' testimony and in his statement in reply would reverse the whole finding of this case. It is obvious that when COW-1 attended the enquiry meeting on 7 January 1999, he testified that the details of complaints made against the respondent, the minutes of the meetings that took place and the outcome of investigation were not put in writing or adduced in the Industrial Court as evidence. This to my mind, puts COW-1's claim that the respondent's admission of guilt during the said meeting is to be disregarded. Hence, regardless of COW-1's evidence, there was enough evidence before the Industrial Court to justify the court's own findings.

(iv) Wrong to invoke s 114 (g) of the Evidence Act 1950

[40] It was submitted that the Industrial Court had erred in law by invoking s 114(g) of the Evidence Act 1950 against the applicant on the basis that the corporate book which provides the policies on cash advances was not adduced in court. Also, it was the applicant's contention that the mechanical application of s 114(g) by the Industrial Court to the present case was contrary to s 30(5) of the Industrial Relations Act 1967.

[41] Counsel for the applicant referred their argument based on the case of *Minolta Malaysia Sdn Bhd v Ng Siew Pheng & Anor* [1996] 3 AMR 3421 wherein the Court held that the Industrial Court had committed an error of law in wrongly applying s 114(g) of the Evidence Act as follows, at p 3433:

> The Industrial Court invoked s 114 (g) of the Evidence Act for the failure of the employer to call Mr Morii. As regards the failure of calling Mr Morii, it was explained that Mr Morii had already left for Japan. In my view such explanation was quite sufficient. Calling him back from Japan can be expensive and tedious. In any case Mr Morii had already given evidence at the inquiry. A member of the domestic tribunal had given evidence before the Industrial Court confirming the propriety of the conduct of the inquiry and of the taking of the evidence of witnesses. *Furthermore, the Industrial Court, being a court of equity, should not be very strict on procedure and should not have invoked s 114(g) at all*. Even if the Industrial Court refused to accept the decision of the domestic tribunal it should not have refused to take into consideration the notes of the proceedings of the inquiry. The evidence of Mr Morii was in the notes of proceedings. Yet the Industrial Court chose not to admit the notes of proceedings. This, in my view, is an error of law. (Emphasis added.)

[42] Understandably, I see the reason why the Industrial Court had invoked the said Act against the applicant. The court was merely ascertaining whether the routine practiced by the respondent in taking advances from the petty cash for travelling was irregular and contravened the procedure practiced by the applicant. Hence the presentation of such corporate book was necessary. Where, the applicant failed to produce the corporate book, the court rightly invoked the s 114(g).

[43] In this instance, I disagree with the applicant's counsel that the Industrial Court had erred in law to invoke s 114(g). I agree with the learned judge decision in the case of *MUI Bank Bhd Johor v Tee Puat Kuay* [1993] 3 MLJ 239. His Lordship Alauddin J held as follows, at p 246:

> The Industrial Court found that the padlock used by the respondent to lock the till was a vital clue in the case and this padlock was not produced before the court. …
>
> Based on these facts, the Industrial Court invoked the provisions of s 114(g) against the applicant. I find that it was perfectly in order for the court to have done so. There is no reason why adverse inferences should not be drawn in the appropriate circumstances against a party who fails to raise such evidence, especially where the evidence could have been produced, as in this case.

(v) Failure to consider whether the dismissal of the respondent was with just cause or excuse.

[44] Counsel for the applicant submitted that in light of the evidence adduced by the applicant on the respondent's misconduct, there was sufficient evidence for the Industrial Court to come to the conclusion that the constructive dismissal of the respondent was with just cause or excuse. By its failure to consider this pertinent fact as well as the severity of the misconduct, the Industrial Court had clearly erred in law.

[45] Having considered the arguments and case laws submitted by both counsel, together with the Industrial Court's decision thereon, I am affirmative that there was no evidence that the respondent was guilty of any serious misconduct and that the same court holds that the dismissal of the claimant by the Company is without just cause or excuse. This can easily be referred to from the Award paras 36 and 39.

(vi) Breach of 30(3) of the Industrial Relations Act 1967.

[46] The applicant submitted that the Industrial Court has erred in its duty by failing to hand down its award within the period of 30 days as provided by s 30(3) of the said Act. Further, the applicant argued that the delay in making the decision from the date of hearings could have diminished the value the judge may place in the demeanour and appearance of the witnesses before him. Also such delay could have caused the judge to have either misunderstood or taken an unwarranted inference from the evidence presented. It was also pointed that such delay was contrary to the objective, spirit and intent of the Industrial Relations Act 1967 of speedy resolution of industrial disputes.

[47] In this matter, I tend to disagree with the applicant's counsel. To my opinion, such delay does not in any way cause the judge then to lose the facts of the case before him. I see that the learned Chairman of Industrial court had made an equitable decision and considered the merits of the case and they have been fully taken into account.

[48] Here, I noted the *VP Nathan*'s case [*VP Nathan & Partners v Illangovan s/o Dorairaj A Suppiah and another motion* [2002] 1 MLJ 341] where his lordship Kamalanathan J held as follows, at p 350:

> It is important for me to appreciate that not all delays in writing a judgment must be viewed as affecting the judge's mind with respect to demeanour and conduct of witnesses, thus affecting their evidence and/or their credibility. *Unless specific instances are shown in the delayed judgment whereby the decision maker had expressly or impliedlv relied on demeanour to arrive at his decision, delay per se to my mind, ought not weigh against that iudgment*. (Emphasis added.)

[49] From the above case cited, I see no basis or contention as made by the applicant's counsel.

(vii) Failure to consider that the order of reinstatement was incompatible to the factual circumstances of the case.

[50] It was submitted by the applicant's counsel that the part of the Award to grant the order of reinstatement should be quashed and remitted back to the Industrial Court for re-evaluation of remedies. The learned counsel for the applicant contested that the Industrial Court erred in law when it failed to direct its mind to two pertinent considerations when devising the order of reinstatement, as follows:

a the contributory misconduct on the part of the respondent when he failed to return the company's property; and

b the high ranking position held by the respondent.

[51] With respect, in this particular ground of appeal, I do agree and go along with the applicant's counsel contention that the Industrial Court should have considered granting compensation in lieu of reinstatement to the respondent to maintain industrial harmony in the applicant's establishment.

[52] Primarily, the reasons why I agree with the applicant's counsel are as follows:

(a) the mere fact that the respondent was penalized by the Industrial Court for his contributory misconduct by retaining the Company's property as stated in para 53 p 28 of the Award;

(b) as enunciated in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, [1997] 1 AMR 1008 SC, the court looked into the contributory misconduct of the claimant;

(c) the post of General Manager held by the respondent then had currently been filled by another. Being a high ranking position as such, the Company cannot withhold the position vacant for long periods as it is detrimental to the Company's operation;

(d) s 20 of the Industrial Relations Act 1967, allows the Industrial Court the discretion to award compensation in lieu of reinstatement in certain circumstances;

(e) that COW-3, who gave evidence against the respondent at the Industrial Court, is still under the employ of the applicant. Should the respondent be reinstated, it could cause disharmony in the work place between the respondent and COW-3;

(f) to my mind, the respondent is relatively young and able; both mind and body and a professional who is most able to secure a good employment elsewhere.

[53] In these regard, I hereby quashed the order of reinstatement and remitted to the Industrial Court for remedies.

CONCLUSION

[54] In conclusion, I am of the view that the Industrial Court award as a whole does not suffer from any illegality, irrationality or procedural impropriety. Generally, the award was neither perverse nor unreasonable and the findings of fact by the learned Chairman were supported by evidence. This court has no reason to interfere with the award by way of judicial review except for the 'reinstatement' which is to be remitted to the Industrial Court for remedies. Inthe circumstances, the applicant's application is hereby dismissed with costs.

Application dismissed.

Reported by Lim Lee Na